SUPREME COURT, U. S.

JUL 31 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 440

CHARLES N. BAPTIST,

Petitioner,

v.

BANKERS INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID S. MACLAY
FRANK F. OBER
MARSH, DAY & CALHOUN
955 Main Street
Bridgeport, Connecticut
Counsel for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statement of the Case 2

Reason for Granting the Writ—Argument 7

Conclusion 11

Appendix:

Opinion of the U. S. Court of Appeals for the Second Circuit 13

Table of Authorities Cited

Cases:

American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965) 10

Baptist v. Shanen, 145 Conn. 605, 145 A. 2d 592 (1958) 3

Fogarty v. Fidelity & Casualty Co., 120 Conn. 296 180 Atl. 458 (1935) 8

Giokaris v. Kincaid, 331 S. W. 2d 633 (Mo. 1960) 10

PAGE

Hill v. Employers Liability Assurance Corporation, 122 Conn. 193, 188 Atl. 277 (1936) 8, 9, 10

O'Brien v. John Hancock Ins. Co., 143 Conn. 25, 119 A. 2d 329 (1955) 7, 8, 9, 10

Preferred Accident Ins. Co. of N. Y. v. Grasso, 186 F. 2d 987 (2 Cir. 1951) 7, 10

Statutes:

Conn. Gen. Stat. Sec. 38-175 (1958) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

CHARLES N. BAPTIST,

Petitioner,

v.

BANKERS INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Charles N. Baptist prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 19, 1967.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, is printed in the appendix hereto and also in the Proceedings in United States Court of Appeals, Second Circuit (Proceedings 30a). The opinion of the District Court for the District of Connecticut relating to the disposition of the reformation count is reported at 245 F. Supp. 33, and is reprinted at page 47a of Volume I of Appendix to Appellant's Brief which is a part of the certified record herein from the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1967. Petitioner's timely petition for rehearing was denied on May 10, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

Did the Court of Appeals and the District Court err in holding that under Connecticut law the insured has the burden of proving the non-applicability of an exception or exclusion contained in a liability insurance policy?

Statement of the Case

The Petitioner was seriously injured when an automobile operated by David Shanen collided in Connecticut with a car driven by Baptist, the Petitioner (Proceedings 34a). The automobile driven by Shanen bore dealer's registration plates registered in the name of a garage corporation (the "garage" was Harold & Shanen's Auto Service, Inc., a two man gasoline service station and used car business). (App. to Appellant's Brief, Vol. I, p. 88a). Shanen was the president and principal stockholder of the garage corporation (Proceedings 33a).

Baptist commenced a personal injury action in the Fairfield County Superior Court of Connecticut against Shanen and the garage (Proceedings 37a). The garage was the named insured under a so-called garage liability policy issued by the Bankers Indemnity Company, the Respondent herein. The insurance company entered an appearance

and defended on behalf of the garage corporation, but refused to do so for Shanen individually. A default judgment in the amount of $45,000.00 was entered against Shanen, but a directed verdict was granted in the action against the garage corporation on the grounds that Baptist had not succeeded in proving that Shanen was acting as an agent of the corporation; ownership of the automobile by the garage or Shanen was not in issue in the state court action (Proceedings 39a).

Baptist appealed, but the trial judge's rulings were affirmed in November, 1958. *Baptist* v. *Shanen*, 145 Conn. 605, 145 A. 2d 592. Thereupon, Baptist, a citizen of New Hampshire, commenced this diversity action in the District Court for the District of Connecticut to collect $25,000.00 of the $45,000.00 default judgment from Bankers Indemnity Company, a citizen of New Jersey, claiming Shanen's individual liability was included within the coverage of the policy with $25,000.00 limits which it had issued to the garage corporation (Appendix to Appellee's Brief 13a). The action was brought pursuant to Conn. Gen. Stat. Sec. 38-175 (1958) subrogating an unsatisfied tort claimant to all the rights of the insured. By the time of trial in 1964, the complaint had been amended to include a claim that the defendant was estopped to deny coverage because of the circumstances under which the policy had been issued, and also to include a second count in the alternative to reform the policy to specifically cover Shanen (App. to Appellant's Brief, Vol. I, pp. 3a-6a). The first count was tried to a jury, but all evidence of estoppel was excluded as "parol evidence." After deliberating for a substantial part of two days and returning once to seek clarification of the judge's charge, the jury brought in a defendant's verdict (App. to Appellant's Brief, Vol. I, p. 2a).

Under the pertinent parts of the insurance policy in question, all in the section labeled "Insuring Agreements" (the policy is reproduced in full in App. to Appellant's Brief, Vol. II, p. 224a), the Respondent agreed with the named insured (Harold & Shanen's Auto Service, Inc.) as follows:

"I COVERAGE A—BODILY INJURY LIABILITY

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . arising out of the hazards hereinafter defined.

"COVERAGE B . . .

• • • • •

"DEFINITION OF HAZARDS

"DIVISION 1—PREMISES—OPERATIONS—AUTOMOBILES

The ownership, maintenance or use of the premises for the purposes of an automobile dealer, repair shop, service station, storage garage or public parking place, and all operations necessary or incidental thereto; and the ownership, maintenance or use of any automobile in connection with the above defined operations, and the occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of the named insured and used principally in the above defined operations.

"DIVISION 2—PREMISES—OPERATIONS—AUTOMOBILES NOT OWNED OR HIRED

The ownership, maintenance or use of the premises for the purpose of an automobile repair shop, service station, storage garage or public parking place, and all

operations necessary or incidental thereto; and the use in connection with the above defined operations of any automobile not owned or hired by the named insured, a partner therein or a member of the household of any such person.

"DIVISION 3 . . .

* * * * * *

"II DEFENSE, SETTLEMENT . . .

* * * * * *

"III DEFINITION OF INSURED

With respect to the insurance under coverages A, B and D the unqualified word 'insured' includes the named insured and also includes (1) any partner, employee, director or stockholder thereof while acting within the scope of his duties as such, and any person or organization having a financial interest in the business of the named insured covered by this policy; and (2) any person while using an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. This policy does not apply:

"(a) . . .

"(b) to any partner, employee, director, stockholder or additional insured with respect to any automobile owned by him, or by a member of his household other than the named insured;

"(c) . . ."

In other words, the policy covered "the insured's" liability ("Coverage A" under "Insuring Agreements") with

respect to a wide range of automobiles "used" or "maintained" or "owned" or "not owned" "in connection with" the garage business including the "non-business" use of such cars "owned by or in charge of the named insured" ("Definition of Hazards," Divisions 1 and 2). It then extended this coverage to a wide range of persons (all defined as "the insured" in addition to "the named insured") including any person "having a financial interest in the business" and "any person while using an automobile covered by this policy" ("III Definition of Insured").

Then, in a proviso tacked onto the very end of this section, it excluded the liability of an employee, stockholder, etc., "with respect to any automobile owned by him."

The narrow question submitted to the jury was whether Shanen "owned" the car within the meaning of this policy exclusion, it having been conceded by the defendant that there *was* coverage if he did *not* "own" it (Proceedings 29a).

Despite the Petitioner's contrary requests and subsequent exceptions (App. to Appellant's Brief, Vol. I, pp. 16a and 40a, respectively), the District Court charged the jury with respect to this narrow question that "The burden of proving by a preponderance of evidence that Shanen did not own the automobile—thereby making the policy applicable—rests upon plaintiff" (App. to Appellant's Brief, Vol. I, p. 29a).

Later in his charge, the trial judge again stressed that the burden of proving that Shanen "did not own the car involved here, and therefore, that said car was covered by the insurance policy involved in this case, rests upon plaintiff" (App. to Appellant's Brief, Vol. I, p. 32a).

And still later in his charge, in defining "burden of proof," the judge for a third time reminded the jury that the plaintiff, and only the plaintiff, had this burden (App. to Appellant's Brief, Vol. I, pp. 33a-34a).

This charge on the critical issue of burden of proof of ownership was upheld by the Court of Appeals which simply stated: "But this very point of Connecticut law was resolved in favor of the insurer by our decision in *Preferred Accident Ins. Co. of N. Y.* v. *Grasso*, 186 F. 2d 987 (2 Cir. 1951). We find no error here" (Proceedings 55a).

Reasons for Granting the Writ—Argument

Few matters of local law have greater impact upon a trial than the placing of the burden of proof on the central issue of the case. In this case the central issue (and, in fact, the only issue submitted to the jury) was whether or not Shanen "owned" the car within the meaning of a policy proviso in effect excluding such cars.

The interpretation and reliance placed by the Court of Appeals on *Preferred Accident Ins. Co. of N. Y.* v. *Grasso*, 186 F. 2d 987 (2 Cir. 1951) with respect to burden of proof, places the Court of Appeals in direct conflict with both older and more recent decisions of the Supreme Court of Connecticut on this "important matter"[1] of local law.

The Connecticut rule that should have been applied in a case such as this is set out in *O'Brien* v. *John Hancock Ins. Co.*, 143 Conn. 25, 119 A. 2d 329 (1955), where it is held that the person claiming under an insurance policy has the

[1] This question was so characterized by Judge Clark in *Preferred Accident Ins. Co. of N. Y.* v. *Grasso*, 186 F. 2d at 991.

burden of proving he comes generally under the coverage of the policy, but that the insurer has the burden of proving the applicability of an exception to the coverage. The *O'Brien* case involved a question whether death was accidental or caused by disease under the double indemnity provisions of a life insurance policy. The court held in part, 143 Conn. 28-29:

> "There are, however, more provisions in the paragraph setting up the double indemnity agreement than those defining the scope of the insured risk. At the end of that paragraph the insurer proceeded to add a number of exceptions. These were obviously inserted for the purpose of withdrawing from the coverage certain specific risks. . . .
>
> ". . . The burden of proving an exception to a risk is on the insurer. *Wojcik* v. *Metropolitan Life Ins. Co.*, 124 Conn. 532, 534, 1 A. 2d 131; *Hill* v. *Employers' Liability Assurance Corporation*, 122 Conn. 193, 202, 188 A. 277; *Fogarty* v. *Fidelity & Casualty Co.*, 120 Conn. 296, 299, 180 A. 458; 6 Cooley, Insurance (2d Ed.) p. 5003; 8 Couch, Insurance, §2217. . . ."

Or as was stated in *Hill* v. *Employers Liability Assur. Corp.*, 122 Conn. 193, 202, 188 Atl. 277 (1936):

> "When a policy insures generally against a particular risk but contains a clause exempting the insurer from liability for a loss caused or arising in a specified manner, but which otherwise would have fallen within the general terms of the policy, that clause is to be regarded as having been inserted by way of proviso, and not as constituting a condition precedent, and should be so pleaded . . . and treated as such."

In the present case, the respondent's policy covered the liability of the corporation (the named insured) with respect to a broad range of automobiles ("used", "owned", "not owned", "in connection with" the business, and "for nonbusiness purposes", etc.). It then extended this coverage to a wide range of persons all defined as "the insured" (including "any person having a financial interest in the business" and also "any person while using an automobile covered by this policy"). Here was a broad sweeping grant of coverage. Then, *further on* in the policy, to quote the *O'Brien* case, " . . . the insurer proceeded to add a number of exceptions. They were obviously inserted for the purpose of withdrawing from the coverage certain risks". The defendant's policy sought to withdraw the risk of covering a person (Shanen, the employee-stockholder) who was otherwise covered under the policy and with respect to a car which was otherwise covered.

This proviso, coming as it did after all the policy provisions relating to "Hazards" and coverage, was clearly an "exception" and not merely an explanation or clarification of earlier language. However, in any event, any doubt in this regard would have to be resolved against the defendant. As was said in the *O'Brien* case, 143 Conn. at p. 29 with respect to this very question of whether such a proviso was a "true exception":

> "This result necessarily follows from applying the rule that when a policy is so framed as to leave room for two constructions, the words used in it should be interpreted most strongly against the insurer. *Rinaldi* v. *Prudential Ins. Co.*, 118 Conn. 419, 423, 172 A. 777."

Nor is the rule of the *O'Brien* case restricted to life insurance policies. *Hill* v. *Employers Liability Assur. Corp.*,

supra, involved a liability policy on a building which excluded coverage during structural alterations. In *American Ins. Co.* v. *Saulnier*, 242 F. Supp. 257 (D. Conn. 1965), Judge Blumenfeld held that a negligence liability insurer had the burden of proving the applicability of a provision stating: "Sec. 2 of this policy does not apply . . . to injury . . . caused intentionally by the insured." See also, *Giokaris* v. *Kincaid*, 331 S. W. 2d 633 (Mo. 1960), which involved an exclusion from so-called "drive other cars" coverage of other cars owned by the insured's family.

As a matter of fact, *Preferred Accident Ins. Co. of N. Y.* v. *Grasso, supra* (and the Connecticut cases cited therein), relied upon by the Court of Appeals only considered the general burden of proving coverage under an insurance policy and not the specific burden of proving the applicability of a specific policy exclusion. This interpretation of *Preferred Accident* is implicit in *American Ins. Co.* v. *Saulnier, supra*, which follows *O'Brien* and places on the insurer the burden of proving the applicability of an exclusion while at the same time in a footnote citing *Preferred Accident* for its main holding that the burden of proof in a declaratory judgment action is not affected by the fact that the insurer may be the plaintiff.

Nevertheless, the Court of Appeals in the instant case has so applied the *Preferred Accident Ins. Co. of N. Y.* case to place it in direct conflict with the later *O'Brien* case and the earlier *Hill* case.

As a result, in this particular case the burden was placed on the Petitioner of proving a negative fact, namely, that he did not come within the exception to the policy coverage which excepts from coverage vehicles owned by

an employer-stockholder of the named insured. The Petitioner was thereby fatally penalized for putting on his evidence in reliance upon the law as set forth by the Supreme Court of Connecticut.

But if the Court of Appeals decision in this case is allowed to stand, the harmful results will reach far beyond this Petitioner. Suits involving insurance policies, particularly automobile liability policies, occur frequently in both state and federal courts, and unless this conflict between the Supreme Court of Connecticut and the United States Court of Appeals for the Second Circuit is definitively resolved, insureds, insurers and beneficiaries of policies will be in a quandry over how to proceed with their causes, and the insurers will presumably make every effort to remove their matters to the federal court to benefit by the Court of Appeals' favorable ruling on this all important question of proof.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID S. MACLAY
FRANK F. OBER
MARSH, DAY & CALHOUN
955 Main Street
Bridgeport, Connecticut
Counsel for Petitioner